The Central Law Journal.

ST. LOUIS, MAY 26, 1882.

CURRENT TOPICS.

Of all the absurdities deducible from the dogma that a corporation has no soul, there are none more flagrant than the pernicious doctrine which has obtained in some cases, that a corporation is incapable of malice, can not be held liable for torts which derive their character from the malice and evil intentions of the person commiting them, though done in pursuance of its interests and in its behalf. Such was the rule early laid down in this State in the case of Childs v. Bank of Missouri, 17 Mo. 213, and in Alabama, in Owsly v. Montgomery, etc. R. Co., 37 Ala., 560, in which it was held that an action for malicious prosecution against a corporation would not lie. See, also, Stevens v. Midland Counties Co., 26 Eng. L. & Eq. 410; McClellan v. Cumberland Bank, 24 Me. 566; State v. Great Works M. Co., 20 Me. 41. In the late Missouri case (Gillett v. Missouri Valley R. Co., 55 Mo. 315), the court expressed the opinion that the language of the decision in Childs v. Bank of Missouri, is too broad, that the proper test is not whether the act complained of as a tort arose from malice, but whether or not it is within the scope of the general powers and duties of the corporation, and that the malicious prosecution complained of in that case was not within the powers granted by the charter of a railroad company. The Alabama case was also subsequently modified in South and North Alabama, etc. R. Co. v. Chappell, 61 Ala. 527.

In Boogher v. Life Association, decided by the Supreme Court of Missouri last week, the court overrule both Childs v. Bank and Gillett v. Missouri Valley R. Co., and hold bluntly that a corporation may be sued for malicious prosecution, quoting the language of the Supreme Court of the United States in National Bank v. Graham, 100 U. S. 702, as follows: "That corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application. They are also liable for the acts of their servants, while such servants are engaged in the business of their principal, in the same manner and to the same extent that individuals are liable under like circumstances. An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance and for libel," and relying upon the authority of the following cases: Copley v. Machine Co., 2 Woods, 494; Riford v. Central Pacific R. Co., 15 Nev. 167; Vance v. Erie R. Co., 32 N. J. L. 334; Williams v. Ins. Co., 57 Miss. 759; Walker v. R. Co., L. R. 5 C. P. 640; Carter v. Howe Machine Co., 51 Md. 290; Fenton v. Machine Co., 9 Phil. 180; Cooley on Torts, 119, 121; 2 Waite Act. & Def., 337.

The cases of Goddard v. O'Brien (decided by the English High Court, Queen's Bench Division on March 27, 1882), and Mechanics' Bank v. Huston (decided by the Supreme Court of Pennsylvania on February 13, 1882), are companion pieces upon the subject of the accord and satisfaction of a debt by the acceptance of a negotiable instrument for a lesser amount. The general rule that a part payment, though received as full payment, is not binding upon the creditor as legal accord and satisfaction, which is well established (Cumber v. Wane, 1 Str. 425; 1 Sm. L. C., 7th ed. 341), is thus stated by Alderson, B., in Sibree v. Tripp, 15 M. & W. 23: "It is undoubtedly true that payment of a portion of a liquidated demand in the same manner as the whole liquidated demand ought to be paid is payment only in part; because it is not one bargain but two; namely, payment of part, and an agreement without consideration to give up the residue." But the giving up of a negotiable instrument for a less sum than a debt, in full payment of it, introduces a different element into the transaction, and the result is felicitously expressed by Huddleston, B., in the case of Goddard v. O'Brien, above mentioned, where the payment of a check for 100*l.* had been received in satisfaction of a debt of 125*l.*: "The doctrine of Cumber v. Wane has been very much qualified by subsequent cases, and

I can not find it better expressed than in the last edition of 1 Smith's Leading Cases, 349, where it is thus stated: 'The general doctrine in Cumber v. Wane, and the reason of all the exceptions and distinctions which have been engrafted on it, may perhaps be summed up as follows: That a creditor can not bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of a larger amount, such an agreement being *nudum pactum*. But if there be any benefit, or even any legal possibility of benefit to the creditor thrown in, that additional weight will turn the scale, and render the consideration sufficient to support the agreement.' " The decision in the Pennsylvania case is precisely to the same effect, the payment in that instance being by a negotiable promissory note, and the authority of Cumber v. Wane being invoked against the conclusion.

RIGHT OF THE PROSECUTION TO STAND JURORS ASIDE.

§ 1. *Purpose of this Article.*—The recent decision of Judge Bond in the case of United States v. Bates,[1] a trial for a misdemeanor, sustaining the motion of the Government to stand aside certain jurors who had been challenged for cause, without showing cause until every juror upon the panel in attendance had been called and passed upon, has attracted considerable attention. This has been spoken of by the daily press as "the new practice inaugurated by Judge Bond," or in terms of similar import. There is no doubt that, in most jurisdictions in this country, this right of the prosecution has so long slumbered that there is good reason for regarding its exercise as something novel. The practice, however, has been for centuries continuously recognized in England as a prerogative of the Crown, and is there regarded to-day as an essential right of the prosecution in the impanelling of a jury. The importance of this right to the representatives of the Federal Government in the enforcement of law in communities strongly steeped in political prejudice, can not be overestimated. If there is any doubt as to what is the correct practice in these courts (and there seems to be), there are strong reasons for holding that this doubt should be solved in favor of the Government. In the case before Judge Bond, powerful arguments were made in behalf of the Government by the Hon. Samuel W. Melton, United States District Attorney, and his associate, Dallas Sanders, Esq., of Philadelphia. I have had the benefit of reading these, and, being impressed with the importance of a full examination of the history of this practice, and the authorities bearing upon it, have supplemented the industry of these gentlemen by additional research.

§ 2. *History of the Practice of Standing Jurors Aside.*—Previous to the statute, 33 Edw. I., stat. 4, the "Ordinance for Inquests," the Crown might peremptorily challenge jurors without limit.[2] It was only necessary for its representatives to say that such jurors were objected to "*quod non boni sunt pro rege.*" But this statute narrowed the challenges of the Crown down to those for cause shown.[3] This statute would seem to have application to civil as well as criminal cases, and, in respect of the latter, in cases of treason and felony, the defendant appears to have become suddenly possessed of an immense advantage over the Crown. The accused could exercise his right of peremptory challenge to the number of thirty-five in such cases, while the Crown could challenge only for cause. If it was the intention of the legislature that the accused should enjoy this inordinate advantage, the courts and the Crown lawyers would not have it so. Accordingly, the effect of this statute was early mitigated by a rule of practice, namely, that the Crown need not show cause against the juror at the time of challenging. The juror might be directed to *stand aside*

[1] Unreported, United States Circuit Court for the District of South Carolina, April, 1882.

[2] Co. Litt. 156 b; 2 Hawk, P. C. C. 43, sec. 3; 1 Chitty Cr. L. 533.

[3] The text of the statute is as follows; "Of inquests to be taken before any of the justices, and wherein our lord the King is party, howsoever it be, it is agreed and ordained by the King and all his council, that from henceforth, notwithstanding it be alleged by them that sue for the King, that the jurors of those inquests, or some of them, be not indifferent for the King, yet such inquests shall not remain untaken for that cause; but if they that sue for the King will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the ustom of the court."

until the whole panel of jurors in attendance had been gone over. If a full jury was not procured before this time, then, and then only, was the Crown required to show cause as to the jurors objected to. Now, in view of the fact that, at common law, the number of jurors to be summoned for the trial of criminal cases lay wholly within the discretion of the judges,[4] it is not surprising that a jury was uniformly procured before the panel was gone over for the first time.[5] Evidence of this is found in Cowper's Case,[6] where it happened that the panel was gone over and a jury not procured. The representative of the Crown was now called upon to show cause as to those jurors whom he had caused to stand aside, whereat that gentleman seems to have been quite taken aback. "I do not know," said he, "in all my practice of this nature, that it was ever put upon the King to show cause, and I believe some of the King's counsel will say they have not known it done."

§ 3. *Abuses under this Practice.*—It is plain that with a large panel of jurors in attendance, the representatives of the Crown might, if unchecked, abuse this right of standing jurors aside, to the sore oppression of accused persons particularly obnoxious to the Crown. This frequently happened in trials for high treason; and on the trial of Horne Tooke for this offense in 1794, Lord Chief Justice Eyre, after defending the right of the Crown to stand jurors aside, candidly observed: "At the same time, I feel that the circumstance which is become absolutely necessary, of making the panels vastly more numerous than they were in ancient times, might give to the Crown an improper advantage, arising out of that rule; and whenever we shall see that improper advantage attempted to be taken, it will be for the serious consideration of the court, whether they will not put it into some course to prevent that advantage being taken."[7] It is not strange that the practice frequently met with vehement resistance on the part of those who smarted under it. Perhaps the most celebrated is that upon the trial of O'Coigly and others in 1798. Eleven of the panel had been thus set aside by the Crown, when, burning with indignation, Mr. Scott, of counsel for one of the defendants, sprang to his feet exclaiming, "I must be chained down to the ground, my lords, before I can sit here, engaged as I am for the life of one of the gentlemen at the bar, and submit to these challenges of the Crown without cause."[8] Taking advantage of Lord Chief Justice Eyre's language in Horne Tooke's Case,[9] he arraigned the practice as against reason, authority and policy, charging it to be the most monstrous violation of law and justice that could be attempted. Commenting upon each of the reported cases in which the practice had been permitted, in heated language he denounced the authority of each and all of them to establish a practice to subvert an act of Parliament: but the judges were impassive. "The rule," said Lord Campbell, C. J., in a later case, "(with a view probably of conveying to the bystanders the notion that it operates harshly against the prisoner) has been often questioned; but it has as often been recognized and established by the presiding judges. The last instance of this was on the trial of John Frost for treason in 1840."[10] The practice is believed to continue in England up to the present time, and but slightly affected by statute.[11]

[4] Sir Harry Vane's Case, reported in Sir J. Kelyng, 16; United States v. Insurgents, 2 Dall. 335; United States v. Fries, 3 Dall. 515.

[5] This practice of standing jurors aside was applied equally to cases of treason, felony and misdemeanor. 2 Hale P. C. 771; 2 Hawk. P. C. Ch. 43, sec. 3; Bac. Abr. Juries, E. 10; 4 Bl. Com. 353; 1 Chitty Cr. L. 534; Anon. 1 Vent. 309; Fitzharris' Case, 8 How. St. Tr. 436; Count Conigsmark's Case, 9 How. St. Tr. 12; Stapleton's Case, 8 How. St. Tr. 503; Lord Grey's Case, 9 How. St. Tr. 128; s. c., Skin. 82; Cook's Case, 13 How. St. Tr. 318; Cowper's Case, 13 How. St. Tr. 1108; Layer's Case, 16 How. St. Tr. 135; Brandreth's Case, 32 How. St. Tr. 755, 772; Reg. v. Geach, 9 Car. & P. 499; Reg. v. Frost, 9 Car. & P. 129; Mansell v. Reg., 8 El. & Bl. 54; Reg. v. Dougall, 18 Low. Can. Jr. 85; Reg. v. McCarttie, 11 Irish C. L. (N. S.) 188; Reg. v. McMahon, Irish Rep. 9 C. L. 309.

[6] 13 How. St. Tr. 1108.

[7] 25 How. St. Tr. 25.

[8] 26 How. St. Tr. 1191, 1231.

[9] *Supra*.

[10] Mansell v. Reg., 8 El. & Bl. 54, 72; s. c., Dears. & B. 375. This language was used in 1856 in reply to an objection against the validity of the practice. See, also, Reg. v. Benjamin, 4 Up. Can. C. P. 179; Reg. v. Fellowes, 19 Up. Can. Q. B. 48.

[11] The statute of 33 Edw. I. was re-enacted in 6 Geo. IV., ch. 50, sec. 29. See Reg. v. Frost, 9 Car. & P. 129, 137. It was ruled at *nisi prius* shortly after the passage of this last act, that the Crown must immediately show cause upon making the challenge. Sawdon's Case, 2 Lewin C. C. 107. But this is not the law. The later statute was not intended to change

§ 4. *The Practice recognized in this Country.*—In this country it is an established principle that, at the Revolution, the people succeeded to the rights and prerogatives of the Crown, and the law continued the same as under the colonies, except as it was altered by the Constitution and laws of the particular State.[12] Acting upon this principle, we find the right of the State to stand jurors aside recognized in several jurisdictions, namely, Pennsylvania,[13] North Carolina,[14] South Carolina,[15] and in the Federal courts.[16] The statute of 33 Edw. I, and the practice under it, as a part of the common law, was brought into prominent notice by Mr. Justice Story in the case of United States v. Marchant.[17] In this connection, however, it is to be noticed that it alludes only to the right of the Crown to stand jurors aside as an established practice. The fact was mentioned only *arguendo*. "We do not say," said he, "that the same right belongs to any of the States in the Union; for there may be a diversity is this respect as to the local jurisprudence or practice. The inquiry here is not as to what is the State prerogative, but, simply, what is the common law doctrine as to the point under consideration.[18] But in United States v. Wilson,[19] the court considered the foregoing expression of opinion as a recognition of the right of the United States to stand jurors aside, and accordingly acted upon this assumption. And Mr. Justice Nelson seems to have taken the same view, observing in United States v. Douglass,[20] that such was the practice in some circuits.

§ 5. *But abolished in New York by Statute.*—In the State of New York this right of the prosecution was taken away by the express terms of a statue. As early as the year 1786, it was enacted that, "in all cases where the attorney-general of this State, in behalf of this State, or he who shall in any case prosecute for the people of this State, shall challenge any juror as not indifferent, or for any other cause, he who shall make any such challenge, shall *immediately* assign and show the cause of such challenge, and the truth thereof shall be inquired of and tried, in the same manner as the challenges of other parties are or ought to be inquired of and tried."[21] This provision was included in the revision of 1801,[22] and in that of 1813,[23] and was preserved in the revised statutes of 1830.[24]

§ 6. *By some Courts held to be Superseded by Grant of Peremptory Challenges.*—In some jurisdictions it is held that the practice we are considering is superseded by implication where the legislature has restored to the prosecution in any degree the right of peremptory challenge. If this is the true view, then the right can hardly have any existence whatever, because by the statutes of every State and of the United States, the prosecution has a certain number of peremptory challenges guaranteed by law, generally both in felonies and misdemeanors, certainly in the former. the Supreme Court of Georgia early took this position.[25] And the point was so ruled

the practice. Mansell v. Reg., 8 El. & Bl. 54; Rex v. Parry, 8 Car. & P. 836. By 37 Vict., ch. 38, sec. 11, applicable to Canada, "The right of the Crown to cause any juror to stand aside until the panel has been gone through, shall not be exercised on the trial of any indictment or information by a private prosecutor for the publication of a defamatory libel." See Reg. v. Patterson, 36 Up. Can. Q. B. 129.

[2] Waterford, etc. Turnpike v. People, 9 Barb. 161, 167, per Willard, J.

[13] Commonwealth v. Addis, 1 Browne, 285; Commonwealth v. Hardy, and Commonwealth v. McGee, cited in note, *ibid*; Commonwealth v. Jolliffe 7 Watts, 585 (overruling on this point, Commonwealth v. Lesher, 17 Serg. & R. 155); Jewell v. Commonwealth, 22 Pa. St. 94; Warren v. Commonwealth, 37 Pa. St. 45; Hartzell v. Commonwealth, 40 Pa. St. 462; Commonwealth v. Marrow, 3 Brewst. 402; s. c., *sub nom.*, Commonwealth v. Marra, 8 Phila. 440; Commonwealth v. Keenan, 10 Phila. 194; Commonwealth v. Magee, 10 Phila. 204; Zell v. Commonwealth (Sup. Ct. Penn. 1880), 2 Crim. L. Mag. 22.

[14] State v. Arthur, 2 Dev. 217; State v. Benton, 2 Dev. & Bat. 196; State v. Shaw, 3 Ired. L. 532; State v. Craton, 6 Ired. L. 164; State v. Bone, 7 Jones L. 121.

[15] State v. Barrontine, 2 Nott & McC. 552; State v. McNinch, 12 So. Car. 89; State v. Stephens, 13 So. Car. 285. See, also, the early and obscurely reported case of State v. Stalmaker, 2 Brevard, 1.

[16] United States v. Marchant, 4 Mason, 158; s. c., 12 Wheat. 480; United States v. Wilson, Baldwin C. C. 78; United States v. Douglass, 2 Blatchf. 207 (Betts, J., dissenting).

[17] *Supra.*

[18] 12 Wheat. 483.

[19] *Supra.*

[20] *Supra.*

[21] 1 Greenl. Laws, 261, sec. 22.

[22] 1 Kent & Radc. L. 385, sec. 25.

[23] 1 R. L. 334, sec. 25.

[24] 2 R. S. 734, sec. 11. See dissenting opinion of Betts, J., in United States v. Douglass, 2 Blatch. 207, 219; People v. Aichinson, 7 How. Pr. 241; People v. Henries, 1 Park. Cr. R. 579. Compare Waterford, etc. Turnpike v. People, 9 Barb. 161.

[25] Sealy v. State, 1 Ga. 213, 216. See, also, Reynolds v. State, 1 Ga. 222.

during the impanelling of the jury in the recent case of United States v. Butler and others,[26] indicted and tried in the United States Circuit Court for the District of South Carolina, before Waite, C. J., and Bond, J.[27] But it is worthy of consideration whether, from the mere fact that the legislature has granted to the prosecution only one-half the number of peremptory challenges enjoyed by the accused, or a less number, it can be intended that the State should have less facilities for procuring an impartial jury. Will it be denied that the State has the same right to an impartial jury as the accused? If not, then why this discrimination? Is it not more reasonable to hold that the right of standing jurors aside remains, notwithstanding the statutes allow the prosecution a small number of peremptory challenges? There is excellent authority to this effect. It is so held in the States of North Carolina,[28] South Carolina,[29] and Pennsylvania.[30] In the latter State, the prosecution has in capital cases, only four peremptory challenges as against twenty allowed the defendant.[31] In Warren v. Commonwealth,[32] the court say: "We do not think the rule is changed by the allowance of peremptory challenges. The necessity of the practice will most probably be somewhat abridged by this law, but the rule itself we need not disturb."[33]

§ 7. *Remarks upon the Right in Federal Courts.*—It is proper to add a few words in regard to the authority of the opinion of Mr. Justice Nelson in the case of United States v. Douglass,[34] which was earnestly pressed upon this court in the argument upon the motion in the case of United States v. Bates. The position taken by Mr. Justice Nelson was, that although the Federal court had adopted a rule, under the act of 1840,[35] for conforming the designation and impanelling of jurors to the laws and usages of the States within the district, the act of 1840 applied only to the mode and manner of drawing or selecting the jury, that is, by ballot, lot or otherwise, as prescribed by the State laws, and did not affect the questions involved in the right of challenging the jurors called, whether peremptorily or for cause; and that those questions stood upon the common law, except where regulated by act of Congress. From this position Mr. Justice Betts, who sat with him, dissented, holding that the act of 1840 manifested a "plain purpose to conform the regulations in regard to jurors in the courts of the United States, so far as practicable, to the existing laws in the particular States;" that, since the laws of New York required the prosecution to show cause "*immediately*," the same rule must prevail in the Federal court sitting in that State. The view of Mr. Justice Betts is sustained by a later decision of the Supreme Court of the United States.[36] Curiously enough, the opinion was delivered by Mr. Justice Nelson himself, but no reference is made to his opinion in the case of Douglass. In regard to the practice of standing jurors aside, he said in the Shackleford case that, "unless the laws and usages of the State, adopted by rule under the act of 1840, allow it on behalf of the prosecution, it should be rejected, conforming in this respect the practice to the State law."[37] This opinion was delivered in 1855. Still later, in 1861, upon the trial of the officers and crew of the schooner Savannah for piracy,[38] in the Circuit Court of the United States for the Southern District of New York, Judges Nelson and Shipman presiding, when, during the impanelling of the jury, the authority of his own opinion in the Douglass case was pressed upon Judge Nelson by Mr. Evarts for the Government, the

[26] 1 Hughes C. C. 457, 467.

[27] The point was hastily determined without argument, and Mr. Justice Bond seems to have regarded this case as no impediment to reaching a contrary conclusion in the later case of United States v. Bates.

[28] State v. Benton, 2 Dev. & B. 196, 204.

[29] State v. McNinch, 12 So. Car. 89; State v. Stephens, 13 So. Car. 285.

[30] Warren v. Commonwealth, 37 Pa. St. 45; Hartzell v. Commonwealth, 40 Pa. St. 462; Zell v. Commonwealth (Sup. Ct. Penn. 1880), 2 Crim. L. Mag. 22; Commonwealth v. Morrow, 3 Brewst. 402; s. c., *sub nom.*, Commonwealth v. Marra, 8 Phila. 442; Commonwealth v. Keenan, 10 Phila. 194; Commonwealth v. Magee, 10 Phila. 201.

[31] 1 Bright. Purd. Pa. Dig., secs. 39 40.

[32] *Supra.*

[33] 37 Pa. St. 55.

[34] 2 Blatch. 207.

[35] 5 U. S. Stat. at Large, 394, Rev. Stat. U. S., sec. 800.

[36] United States v. Shackleford, 18 How. (U. S.) 588.

[37] 18 How. 590.

[38] Trial of the officers and crew of the Privateer Savannah, on the charge of Piracy. Reported by A. F. Warbuton, Stenographer. Baker & Godwin, N. Y. 1862. Neither this case nor that of the United States v. Shackleford, *supra*, seems to have been brought to the attention of Judge Bond in United States v. Bates.

learned judge is reported somewhat obscurely, as saying: "I think we have since qualified that in the case of Shackleford. It was intended to settle that debatable question, and it was held that the Act of Congress, requiring the impaneling of jurors to be according to the practice in State courts did not necessarily draw after it this right of setting aside." [39]

From the foregoing, it appears that the Douglass case is no authority at all for the practice of standing jurors aside in opposition to the practice in the State courts in those districts where the Federal court has adopted a rule, under the act of 1840, for conforming the designation and impanelling of jurors to the practice existing in the State courts. This would, in general, be fatal to the exercise of the right, for it is only in the States of Pennsylvania, North Carolina and South Carolina, that the prosecution exercises this right. But there seems to be a ground upon which the practice may nevertheless be supported, regardless of the usage in the State courts. It is this: That since the passage of the act of 1872,[40] providing a complete system of challenges for the Federal courts, the practice of these courts in the matter of challenging jurors ought to be entirely independent of any State law or usage.[41] The latter statute, as found in the Revised Statutes,[42] provides that "where the offense charged is treason, or a capital offense, the defendant shall be entitled to twenty, and the United States to five, peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to three peremptory challenges; and, in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges." In view of the great disparity between the number of peremptory challenges guaranteed to the Government and to the accused in cases of treason and felony, it would seem that the Federal courts would be justified in being slow to deprive the Government of a right which, under the circumstances, may be highly essential to the procuring of an impartial jury. But, in the impanelling of jurors for the trial of misdemeanors, the right of the Government to stand jurors aside is hardly defensible. It would seem that since peremptory challenges have been granted by statute to the prosecution, the existence of the practice can only be defended where the prosecution has not an equal number of peremptory challenges. It can hardly be supposed that any intention ever existed to give the prosecution an equal right of objection to jurors with that enjoyed by the accused, in addition to the right to stand jurors aside.

EDWIN G. MERRIAM.

St. Louis, Mo.

[39] Ibid. p. 10.
[40] 17 U. S. Stat. at Large, 282, sec. 2.
[41] United States v. Shackleford, 18 How. 588.
[42] Sec. 819.

MISCONDUCT OF COUNSEL IN ARGUMENT.

The conduct of the argument in a case is a matter much within the discretion of the trial court, and it is only when this discretion is abused that appellate courts will interfere. On this all the authorities are agreed. The routine matters of the trial, such as what shall be admitted in argument to the jury outside of the evidence, the degree of invective allowed, and the time during which the argument shall continue, are largely in the discretion of the court at *nisi prius*.[1] But as to what is an abuse of discretion, as to just how far courts may permit counsel to go in argument, the authorities are not agreed. The line separating what is proper or allowable from what it is improper and erroneous to permit counsel to comment upon, is dim and ill-defined, and cases may be found close to the line on either side.

As a general rule counsel, in argument, must confine themselves to the facts brought out in evidence.[2] And it is error and sufficient cause for a new trial to permit counsel, over objection and exception, to comment upon facts pertinent to the issue but not in

[1] Proffat Jury Trial, sec. 249; State v. Hamilton, 55 Mo. 520; State v. Waltham, 46 Id. 55; Scripps v. Reilly, 35 Mich. 371; s. c., 24 Am. Rep. 575, St. Louis, etc. R. Co. v. Mathias, 50 Ind. 65; Larkins v. Tarter, 3 Sneed. 681; Lloyd v. Hannibal, etc. R. Co., 53 Mo. 509; Kaime v. Trustees, 49 Wis. 371; Barden v. Briscoe, 36 Mich. 254; Hilliard New Trial, 225.

[2] Dickerson v. Burke, 25 Ga. 225; Doster v. Brown, Ib. 24; Cook v. Ritter, 4 E. D. Smith. 253; Lloyd v. Hannibal, etc. R. Co., 53 Mo. 509; Read v. State, 2 Ind. 438; Walker v. State, 6 Blackf. 1; State v. Lee, 66 Mo. 165.

evidence,[3] or to appeal to prejudices foreign to the case made by the evidence, and calculated to have an injurious effect.[4] It has been held that the misconduct may be so flagrant that the court should interfere without objection,[5] but the great weight of authority is the other way, and failure to so interfere is not ground for a new trial,[6] though the court may interfere of its own accord and stop counsel or even grant a new trial because of misconduct, and such action will be sustained by the appellate court unless there has been a gross abuse of discretion.[7]

Under the rule restricting the argument to the evidence, it is improper for counsel to comment on minutes of evidence taken at a former trial,[8] or to state and assume as a fact anything that has not been proved or put in evidence.[9] One court has gone so far in enforcing this rule, as to hold that where there is no evidence legally sufficient, no argument should be allowed;[10] but this, certainly, can not be so in criminal cases in those States where counsel are allowed to argue the law as well as the facts to the jury.[11]

As not pertinent to the issue, but calculated to prejudice the case, it has been held improper for counsel to refer to the fact that a change of venue was taken;[12] or, in a criminal case, that defendant failed to testify;[13] or that he had not called as witnesses two accessories;[14] or that he failed to produce evidence of good moral character;[15] but acts showing bad faith or dishonesty, appearing in the record, may be commented upon.[16] So it is improper to attack the opposite party's character when he has not been impeached and to use language tending to degrade and humiliate him;[17] but it is proper to allude to the manner and change in countenance of a party while testifying.[18] It is error for the court to permit counsel, over objection, in a trial for murder, to comment on the frequent occurrence of murders in the neighborhood, and agree that an example should be made of the defendant;[19] but it was held in another trial for murder that, where counsel was allowed to say in his address to the jury: "Three or four men have been recently executed at Indianapolis, most of whom set up the plea of insanity," the error was not of sufficient materiality to justify a reversal.[20] So in an action against a railroad company, the appellate court refused to interfere where counsel had told the jury that the question for them to determine was, "whether this country shall be governed by railroad companies or by the people."[21]

Where the court, over objection, has erroneously permitted counsel to persist in such misconduct, an instruction to the jury that they should disregard or not consider such matters, will not cure the error.[22]

It will be seen from these authorities that each case must depend to a great extent on the particular facts involved. As a general rule, courts should be firm in confining counsel to the record and the evidence; and yet great freedom of debate should be allowed. To properly apply these two seemingly inconsistent rules to every case, and to tell just where counsel have overstepped the bounds and abused their privilege, is a matter of no little delicacy. As the court says in Combs v. State:[23] "To rigidly require counsel to con-

[3] Brown v. Swineford, 44 Wis. 282; s. c., 28 Am. Rep. 582; s. c., 7 Cent. L. J. 208; Yoe v. People, 49 Ill. 410; Kennedy v. People, 40 Id. 489; Bill v. People, 14 Id. 432.

[4] Ferguson v. State, 49 Ind. 33; Hennier v. Vogel, 66 Ill. 401; Kinnaman v. Kinnaman, 71 Ind. 417; Tucker v. Henniker, 41 N. H. 317; State v. Smith, 75 N. C. 306.

[5] Berry v. State, 10 Ga. 511; Saunders v. Baxter, 6 Heisk. 369.

[6] St. Louis, etc. R. Co. v. Myrtle, 51 Ind. 566; Gilhooly v. State, 58 Id. 182; Tucker v. Henniker, 41 N. H. 317; Davis v. State, 33 Ga. 98.

[7] Kinnaman v. Kinnaman, 71 Ind. 417; St. Louis, etc. R. Co. v. Myrtle, 51 Id. 566; Farman v. Lauman, 73 Id. 568; Forsyth v. Cothran, 61 Ga. 278.

[8] Martin v. Orndorff, 22 Iowa, 505; Walker v. State, 6 Blackf. 1; State v. Whit, 5 Jones (N. C.) 224.

[9] Bill v. People, 14 Ill. 432; Wightman v. Providence, 1 Cliff. 524; Rolfe v. Rumford, 66 Me. 564; s. c., 4 Am. L. T. R. 461.

[10] Bankard v. Baltimore R. Co., 34 Md. 197.

[11] Lynch v. State, 8 Ind. 541.

[12] Farman v. Lauman, 73 Ind. 568.

[13] Long v. State, 56 Ind. 182.

[14] State v. Degonia, 69 Mo. 485.

[15] Fletcher v. State, 49 Ind. 124; State v. Lee, 66 Mo. 165.

[16] Cross v. Garrett, 35 Iowa, 480.

[17] Coble v. Coble, 79 N. C. 589; s. c., 28 Am. Rep. 338.

[18] Huber v. State, 57 Ind. 341.

[19] Ferguson v. State, 49 Ind. 33.

[20] Combs v. State, 75 Ind. 215.

[21] St. Louis, etc. R. Co. v. Mathias, 50 Ind. 65.

[22] Scripps v. Reilly, 35 Mich. 371; s. c., 24 Am. Rep. 575; Forsyth v. Cothran, 61 Ga. 278; Tucker v. Henniker, 41 N. H. 317; Martin v. Orndorff, 22 Iowa, 505. *Contra*, Kennedy v. People, 40 Ill. 489.

[23] Combs v. State, 75 Ind. 215. See, also, McNabb v. Lockhart, 18 Ga. 495; Haderlein v. St. Louis R. Co., 3 Mo. App. 601; Winter v. Sass, 19 Kas. 557; Hilliard New. Tr. 225.

fine themselves directly to the evidence would be a delicate task, both for the trial and the appellate courts, and it is far better to commit something to the discretion of the trial court, than to attempt to lay down or enforce a general rule defining the precise limits of the argument. If counsel make material statements outside of the evidence, which are likely to do the accused injury, it should be deemed an abuse of discretion, and a cause for reversal; but where the statement is a general one, and of a character not likely to prejudice the cause of the accused in the minds of honest men of fair intelligence, the failure of the court to check counsel should not be deemed such an abuse of discretion as to require a reversal."

W. F. ELLIOTT.

Indianapolis, Ind.

FRAUDULENT CONVEYANCE — ASSIGNMENT FOR BENEFIT OF CREDITORS — FRAUD OF GRANTOR—BONA FIDES OF ASSIGNEE.

CRAFT V. BLOOM.

Supreme Court of Mississippi.

1. One who receives a new security for a pre-existing debt without any new consideration is a volunteer and not a purchaser for value. Therefore, where an assignment is made for the benefit of pre-existing creditors, the assignee is not a purchaser for value, and good faith on his part will not protect the validity of the assignment, if it was executed with a fraudulent intent on the part of the assignor.

2. The facts that one of the debts secured by such an assignment is the fee of the attorney of the grantor for services rendered in drawing the instrument, and was therefore a contemporaneously contracted debt, and that the attorney acted in perfect good faith will not have the effect to render such an instrument valid as to the debt so secured.

3. While the insertion of a false and fictitious debt in an assignment for the benefit of creditors avoids the instrument only *pro tanto*, still it is the badge of fraud, to be considered and weighed by the jury in connection with all the facts in the case, to determine whether in truth the instrument was executed with a fraudulent intent.

4. An instruction to the jury that if the grantor was induced to make such an assignment by the hope or expectation of subsequent benefits, held out to him by any of the creditors secured by it, that fact would render it void, is error. A promise that the grantor shall enjoy some secret benefit in the thing conveyed will have that effect, but not a promise of future benefits unconnected with the property transferred.

Appeal from the Circuit Court of Marshall County.

On January 17, 1881, J. B. Rosenfeld, a storekeeper, who, weeks before, had announced his intention to make an assignment, applied to Watson, Watson & Smith, telling them that he put himself in their hands. These lawyers, upon examining his affairs, advised him to make a general assignment for the equal benefit of all his creditors, and agreed that their fee of $500 should be secured by the instrument, and the grantor released from liability. List of assets and creditors were furnished by Rosenfeld's bookkeeper, and believed by the lawyers to be correct. The assignment as drawn and executed however contained fictitious debts, which were unknown to the lawyers mentioned. During the preparation of the deed, Rosenfeld, with an agent of S. O. Thomas & Co., came into the lawyers' office and directed them to prefer that firm for five thousand dollars; but, when the agent left, Rosenfeld revoked the order. The agent was informed of this by the lawyers, and returned, and conversing privately with Rosenfeld, told him that S. O. Thomas & Co. had protected him once before, and would do so again. Rosenfeld then, against his counsels' advice, intrusted them to make the preference. The assignment conveyed his property by description to Addison Craft, and provided for distribution of the assets as follows: "He shall first pay the costs of executing this trust, including a reasonable compensation to himself, and $500 to Messrs. Watson, Watson & Smith, my attorneys; second, he shall pay Allen Perkins, Jack Perkins and S. O. Thomas & Co. in full; third, he shall pay Charles Smith, L. Rosenfeld, P. S. Allison, Lena Levy, C. C. Rosenfeld and Green Davis in full; fourth, he shall pay S. Rosenfeld in full; fifth, he shall distribute the residue of the fund realized among my remaining creditors pro rata (several of my creditors having security, shall only receive a pro rata upon the balanced which may remain due after said security is exhausted; and if the security in any case exceeds in value the debt secured, the excess shall go to the assignee herein, and be applied as my other assets)."

The property conveyed being insufficient to pay through the fourth class of creditors, the appellees, who were in the fifth class, attached the goods, and the appellant claimed them. On the trial of the claimant's issue, it was shown from the grantor's books that a balance of only $400 was due L. Rosenfeld, his bookkeeper; that Green Davis was a debtor; and that the names of S. Rosenfeld, C. C. Rosenfeld, the grantor's wife, Lena Levy, her sister, and P. S. Allison, his clerk, were not on the books. Lena Levy testified that she had entertained her sister and family when refugees from an epidemic, but that no charge was made, and nothing was due her. The existence of S. Rosenfeld was left in doubt by the evidence. Witnesses testified that, on the night of the assignment, J. B. Rosenfeld, who was drink-

ing, told L. Rosenfeld to "fix up the books for himself and the boys," and said that he "had his creditors down, and they must agree to his terms or they would not get a cent, but the boys in the store would have a new boss for a while;" and that later, but before the assignee took possession, the key of the store was lost, a barrel of coal oil was rolled out, several sacks full of fancy articles and seventeen suits of men's clothing were carried to Rosenfeld's, and a dray load of sugar, coffee and flour were driven to the residence of the grantor and his clerks. No entry of these transactions appeared in the books. It was further shown that J. B. Rosenfeld, who had previously failed and compromised with his creditors, paying them all, except S. O. Thomas & Co., one-third of their claims, proposed a like settlement soon after this assignment, by letters written by the lawyers, who called and attended a meeting of the creditors for that purpose without success.

Judgment by default against the defendant in attachment being proved for the sum due the appellees, the jury, under the instructions set forth in the opinion, decided the claimant's issue against the appellant, and thereupon the property in controversy was condemned, and ordered to be sold for the payment of the debt and costs.

Watson, Watson & Smith and *C. B. Howry*, for appellant; *Strickland & Wooten* and *L. Johnson*, or appellees.

CHALMERS, C. J., delivered the opinion of the court:

The court below properly held that the deed of assignment in this case was not fraudulent upon its face; and the jury properly found, as we think, that it was shown by the testimony to have in fact been executed by the grantor with intent to defraud his creditors. It is urged however by the appellant that the verdict and judgment must be reversed because of erroneous rulings of the court in giving and refusing instructions to the jury. Thus it is said that the court erred in charging the jury that if they believe that the assignment was made with fraudulent intent on the assignor, the assignee obtained no title, though he himself was ignorant of such intent; and refused a charge asked by the assignee to the effect that he was to be deemed a purchaser for value and therefore acquired a good title by virtue of his own good faith, even though the instrument was made with fraudulent intent on the part of the grantor. Whatever contrariety of opinion may elsewhere exist as to the merits of these conflicting propositions, nothing is better settled in this State than that he who merely receives a security for a pre-existing debt without the advance of any new consideration, is to be regarded and treated as a volunteer, and not as a purchaser for value. Surget v. Boyd, 57 Miss. 485. All the debts secured by the assignment in the present case except one (to be presently considered) were pre-existing debts, and it is not pretended that any new consideration was advanced either by the assignee or by the creditor, whose trustee he was. The instructions of the court were therefore correct on this point.

It is said that the court erred in instructing the jury that if they believe that one unfounded and fictitious debt was secured by the assignment, this rendered the entire instrument void, even as to those creditors whose claims were honest and who had no connection with or knowledge of any fraud on the part of the assignor. We do not so understand the charges granted by the court. Four charges were given on this point, and while one of them seems, as copied in the bill of exception, ambiguous and perhaps susceptible of this construction, the others quite plainly and unmistakably tell the jury that the insertion of false and fictitious debts in an assignment for the benefit of creditors is only a badge or evidence of fraud to be considered and weighed by them in connection with all the facts of the case, in determining whether in truth the instrument was executed with a fraudulent intent. We know of no authorities which announce a rule on this subject more favorable for the appellant in this case. The weight of authority seems to be in favor of the doctrine that the insertion of fictitious debts in a deed of assignment avoids the instrument only as to the fraudulent debts, leaving it intact in favor of the honest creditors whose debts are secured by it, and who had no privity with the fraudulent intent on the part of the assignor. But, for several reasons, the question is not presented by the case before us. As before remarked, the most favorable doctrine was announced for the appellant, who alone assigns error, and who, of course, is not aggrieved by the rulings upon this subject. In the second place, the doctrine that, though the inducing cause of the assignment on the part of the maker was the fraudulent intent to secure payment of a fictitious and unfounded debt, the instrument will nevertheless be valid as to all holders of just debts who had no connection with this dishonest purpose, can have no application in this State, in cases where all the just debts secured are pre-existent ones, and no new consideration has been advanced, for the reason that the holders of such debts are deemed with us mere volunteers in accepting new securities, and, as such, bound by the fraud of the grantor, though they have no actual knowledge of it. The deliberate and intentional insertion by an assignor of a debt known by him to be unfounded must ever be a strong badge of fraud, and wherever a court or jury is satisfied from this or other circumstances, that the intent and object in making the conveyance was to defraud creditors, the instrument will be void as to all pre-existing debts secured by it, regardless of the knowledge or participation of the creditors.

It is said, however, that there is one debt secured by the assignment in this case which is not of this character, and that the *bona fides* of the holder of that claim will uphold the instrument

at least to the extent of protecting this demand, without regard to intent of the assignor. This is the fee due the attorneys, who advised the execution of and prepared the assignment. When called upon for their advice and assistance in the matter, they demanded a fee of $500, and when the debtor professed his inability to pay so large a sum, they proposed to release him from all personal liability, and to accept in lieu of it a stipulation in the deed that the fee should be a preferred debt and should be paid by the assignee out of the assets among the first debts secured. This proposition was accepted, and the instrument was drawn accordingly. It is admitted that the attorneys had no knowledge or suspicion that the debtor had any intention of defrauding his creditors in making the assignment, and the entire good faith of the attorneys themselves is conceded. It is hence argued that inasmuch as theirs was a contemporaneously contracted debt, and they gave up all personal demands against the debtor in consideration of being included in the assignment, they are to be regarded as purchasers for value, and their good faith must protect the instrument so far at least as their own demand is concerned. We can not assent to this view. We think that the testimony shows an agreement on the part of the attorneys to risk their fee on the integrity of their client and the validity of the instrument prepared by themselves. But apart from this, we think it unsafe to declare that an instrument intentionally executed by the grantor for the purpose of swindling his creditors is to be upheld in any court for any purpose, by the good faith of the attorney who prepared it, even to the extent of upholding the fee of the attorney. Such an announcement would certainly lead at once to the insertion of a stipulation in every assignment similar to the one here, and there would be an end of all fraudulent assignments. Every deed would be upheld by the good faith of the attorney who prepared it, and as the communications that pass between client and counsel are confidential, it would be impossible to detect the fraud where any existed. The relations between the parties are too intimate and confidential, and too jealously guarded by the law to admit of the doctrine that the fraud of the client can be purged by the good faith of the lawyer. It is true, as urged by counsel, that under the bankrupt law the fee of the attorney who acts for a voluntary bankrupt is allowed even in cases where a discharge is denied to the applicant, but there is no analogy in the illustration. The fee is allowed there for services rendered in court and in accordance with its rule of procedure. Here, it is an outside matter with which the court has no connection, and over which it has no control. The true analogy is found in a case where a person has been forced into involuntary bankruptcy, because of the execution by him of some fraudulent conveyance. Certainly, in such a case, the bankruptcy court would not uphold the conveyance for the purpose of paying the lawyer who drafted it, no matter how innocent he might be in the matter.

The second instruction given for the plaintiffs in attachment was too broad. By it the jury were told that the instrument should be avoided, if the grantor was induced to make it by the expectation 'and hope of subsequent benefits held out to him by any of the creditors secured by it. This is erroneous. An instrument will be avoided which has been induced by the promise that the grantor shall enjoy some secret benefit in the thing conveyed, because this is inconsistent with the professed object of the conveyance, and operates as a fraud upon the other creditors whose *pro rata* share is thereby diminished. But no promise of future benefits unconnected with the property transferred will avoid the deed, though it constituted one of the principal inducements to its execution. It is the reservation of a benefit in the thing conveyed, not the expectation of some reward independent of it, of which other creditors can complain.

We shall not reverse the case because of this erroneous instruction. Averse as we are to affirming verdicts despite erroneous charges, we will not hesitate to do it where, leaving wholly out of view the subject matter of the erroneous charge, the finding is so plainly right on the other matters involved that any other verdict than the one rendered should be set aside. Such we think is the case before us. If a fraudulent intent on the part of the assignor was not established in this case, it is impossible to see how it is ever to be shown. He started out by deceiving his own lawyers, pretending to seek their advice and put himself in their hands as to what course he should pursue in his financial embarrassments, when it was shown that he had made up his mind weeks beforehand that he would make the assignment. Professedly acting in obedience to his lawyers' instructions, he refused to follow their advice by making a conveyance for the equal benefit of all his creditors, and made one by which he preferred his wife and other near relatives. One of the debts thus preferred was undoubtedly simulated, none of them were shown to be genuine, while all of them were probably fictitious. It is admitted that goods were abstracted from the storehouse after execution of the assignment for the benefit of himself and clerks, the only dispute being as to the amount of these abstractions. All this was wholly independent of and disconnected from the matters alluded to in the erroneous instruction. If the verdict had been in favor of the good faith of the assignment, it would have been the duty of the court below to have set it aside. We therefore affirm it, despite the erroneous instruction.

Judgment accordingly.

MUNICIPAL CORPORATION — OBSTRUCTION OF STREET — REASONABLE AND TEMPORARY—PUBLIC CONVENIENCE.

SIMON v. CITY OF ATLANTA.

Supreme Court of Georgia, January 24, 1882.

A temporary and reasonable obstruction of a street by municipal authority for the sake of public safety and convenience during a procession of the fire department is not unauthorized and illegal, and a person injured in consequence of it, without special negligence on the part of the municipality, can not recover damages for such injury.

From the Fulton Superior Court.

S. A. Darnell, George S. Thomas, T. P. Westmoreland, for plaintiff in error; *W. T. Newman*, for the City.

SPEER, J., delivered the opinion of the court:

The plaintiff was driving his beer wagon along Broad street, and as he approached Marietta street, which crosses Broad street at right angles, he found that the way was obstructed by ropes stretched across from the building on one corner to the other on both the north and south sides of Marietta street where it intersected Broad street. There were policemen in the vicinity of the ropes. Plaintiff stopped his wagon, was told by some one in the crowd to come on, that the ropes would be raised for him to pass under. He passed under the rope on the north side of Marietta street, but when he reached the south side the rope there, which had been raised, either fell or was lowered so that it dragged him to the ground, causing him permanent injury. The ropes had been placed as described on account of the parade of the Fire Company.

Defendant moved a nonsuit, which was allowed by the court, and plaintiff excepted.

The defendant in error insists that there was no evidence showing that the ropes constituting the obstruction complained of, were placed across the streets by authority or permission of the city; and that the presence of police officers near the ropes, even if they were at fault in not at once removing them, does not render the city liable for the default or misconduct of its officers, as has been ruled in 54 Ga. 648; 62 Ga. 290; Rivers v. City of Augusta, September term, 1880.

But taking it for granted that the ropes were placed there by permission of the city (as from the evidence it may well be presumed they were), the question is, did the city have the right, under the circumstances, thus temporarily to obstruct the streets? This is the proposition denied by the plaintiff in error, and upon it he bases his right for damages.

We recognize the doctrine so earnestly contended for by counsel for plaintiff in error, that streets and public places belong to the general, as well as to the local public, and that if the central and general supervision of streets is conferred by the legislature upon the municipality, it holds them in trust for the convenience and use of the public at large, and it becomes its duty to keep them not only in a safe and suitable condition for the passage of persons and transportation of commodities, but also to keep them free from any such unauthorized obstructions as may permanently or unreasonably interfere with their public use and enjoyment. But with reference to streets in populous places, the public convenience will require more than the mere right to pass over them. It may be necessary to grade them to a level, to dig up the earth, and use it in improving the streets, to make sewers, culverts and drains upon or under the surface, and to do all such acts as are incidental to the beneficial use of the streets by the public.

The primary purpose of a street is for passage and travel, and any unauthorized and illegal obstruction to its free use comes within the legal notion of a nuisance, and any such nuisance as would leave the street or way in an unsafe and dangerous condition, or impair its use in an unreasonable manner, or for an unreasonable time, would make the city liable for any damage resulting therefrom. 2 Dill. 722. But it is not every obstruction, irrespective of its character or purpose, that is illegal, although not sanctioned by express legislative or municipal authority. On the contrary, the right of the public to the free and unobstructed use of a street or way is subject to reasonable and necessary limitations. The carriage and delivery of fuel, grain or goods, are legitimate uses of a street, though it may result in the temporary obstruction to the right of public transit. So the improvement of the streets is not an invasion of the public easement, but simply incidents to, or limitations on it. They can be justified when and only so long as they are reasonably necessary. The necessity, if reasonable, suffices. The right temporarily to obstruct a street springs from reasonable necessity, and is limited by it, and those who exercise the right must discommode others as little as is reasonably practicable, and when they have done this, the law holds them harmless. Davis v. Winslow, 51 Me., 264, 297; 67 Me., 46.

That, so long as the alleged obstruction is for the public convenience there can be no reasonaground of complaint, was held in King v. Russell (6 B. & C., 566); but the extent of this principle has been since questioned.

It is, however, a safe and reasonable rule to declare that, so long as the obstruction is temporary and reasonable in its character, and is intended for the public safety and convenience, it is no cause of complaint. The obstruction in this case, so far from being a nuisance, was a wise provision to guard the public from collision, and to preserve the order and discipline of the procession of the fire department.

An efficient fire department is absolutely essential to the safety of life and property. Its efficiency depends upon its drill, discipline and the

proper condition of its implements. These drills and parades can only be had in public thoroughfares, and, if it be necessary temporarily to keep these thoroughfares open by rope obstructions stretched across certain streets, thus closing others leading to them, it is one of those limitations upon the use of public streets, and the right of transit thereon, to which the public must yield, since the public at large are in the results its beneficiaries.

We think that there was no case made against the city in behalf of the plaintiff, and the nonsuit awarded was right. Let the judgment of the court below be affirmed.

PARTNERSHIP—INDORSEMENT—INDIVIDUAL MEMBER'S NOTE— FIRM LIABILITY.

REDLON v. CHURCHILL.

Supreme Court of Maine, January 10, 1882.

1. When a member of a firm makes his individual note payable to his own order and indorses thereon his own name and the name of his firm, and receives and appropriates the proceeds to his own use, the firm will be liable therefor, being duly notified, to an indorsee who, in good faith, for an adequate consideration purchased the same before maturity, ignorant of all the circumstances affecting its validity.

2. The form of the note is not notice that it was given for the maker's accommodation and in fraud of the firm.

3. The purchase of the note of a broker furnishes no presumption that the broker was the agent of the maker.

On report from Superior Court.

Assumpsit on a promissory note against the firm of Churchill & Melcher.

The case is fully stated in the opinion.

George W. Verrill, for the plaintiff; *Clarence Hale*, for Holman S. Melcher, one of the defendants.

APPLETON, C. J., delivered the opinion of the court:

This is an action of *assumpsit* against the defendants as indorsers of the following described note:

$200.00. Portland, September 29, 1880.

Four months after date I promise to pay to the order of myself $200 at any bank in Portland. Value received. No. 2672. Due January 29.

George L. Churchill.".

Indorsed on the back of the note is,

"George L. Churchill."

"Churchill & Melcher."

The note not being paid at maturity was protested, and the defendants were seasonably notified.

The defense set up was, that Churchill made the note and the indorsements thereon and obtained the money on the note for his own use and without the knowledge or consent of his partner. The evidence shows that the plaintiff purchased the note before its maturity, of a broker and paid for the same in good faith and ignorant of any facts affecting its validity.

The general rule as laid down in Collier on Partnership, sec. 447, is "that a partnership security negotiated through the fraud of one of the partners, is nevertheless binding on the firm, in the hands of an indorsee for a valuable consideration without notice of the fraud." The evidence clearly shows the plaintiff to be such indorsee. The remarks of Lord, J., in the Atlas National Bank v. Savery (127 Mass. 75), are applicable to the case at bar: "The notes were obtained by the plaintiff in the market, with no evidence that the party from whom they were obtained was not a *bona fide* holder of them for value. The fact that the party from whom they were obtained was a broker, if from that fact it is to be inferred that he was not the owner, raises no presumption that he was the agent of Law (here Churchill), for the negotiation of the notes? If any presumption could arise from that fact that he was the agent to any party to the notes it would be that he was the agent of the last indorser of the notes." So that if the broker was not the owner of the note the inference would be that he was the agent of the defendants—the last indorsers — who would in that case be indisputably liable.

When one of a firm makes his own note payable to his own order and indorses thereon the name of his firm and receives and appropriates to his own use the proceeds thereof, the firm being duly notified, will be liable therefor to an indorsee, who in good faith, for an adequate consideration purchased the same before maturity and in ignorance of any circumstances affecting its validity. The form of the note is not notice that the note is given for the maker's accommodation. In Wait v. Thayer, 118 Mass. 474, one Warner made and indorsed a note payable to the firm of which he was a member, for his own use. In delivering the opinion of the court, Wells, J., says: "Warner being a member of the firm whose indorsement appeared upon the note, the fact that he was also the maker of the note in his individual capacity did not give rise to any conclusive presumption that it was an accommodation indorsement, or that he negotiated the original loan and received the money for his own private use, and as a co-partner." In Parker v. Burgess, 5 R. I. 277, a note made by a co-partner payable to his own firm, was indorsed by him in the co-partnership name to another in payment of his individual debt, with notice that he had no authority to use the firm name, and the note indorsed by the party, who received it in blank, was purchased by the plaintiff from a broker before maturity, for full value, and without notice of the transaction in which the note originated. Held, that the plaintiff was entitled to recover of the firm, as indorsers, the amount of the note, the paper not indicating, and he having no notice of

the fraud practiced upon the firm by its co-partner. The form of the note is no notice of an intended or accomplished fraud on the firm by one of its members. These views have long since received the sanction of this court. Waldo Bank v. Lumbert, 16 Me. 416; Waldo Bank v. Greeley, 16 Me. 419.

That Churchill made the note payable to his own order and then indorsed the name of the firm can not change the result. It is immaterial whether the note was made originally payable to the firm or to the maker's order, and then indorsed with the firm name.

It is sufficient that the plaintiff is a purchaser for value, in good faith and without knowledge of any defect of title. A suspicion of defect, or a knowledge of facts which might excite in the mind of a cautious person, or even negligence not amounting to fraud or bad faith will not defeat the rights of the purchaser. Such is the universally recognized law on this subject. Farrell v. Lovett, 68 Me. 326; Kellogg v. Curtis, 69 Me. 212; Hobart v. Penny, 70 Me. 248; Smith v. Livingston, 111 Mass. 342; Freeman's National Bank v. Savery, 127 Mass. 79; Murray v. Lardner, 2 Wall. 110; Cromwell v. Sac. Co., 96 U. S. 51. Defendants defaulted.

WALTON, BARROWS, DANFORTH, VIRGIN and SYMONDS, JJ., concurred.

NEGOTIABLE PAPER — COLLATERAL SECURITY FOR PRE-EXISTING OBLIGATION.

STRAUGHAN v. FAIRCHILD.

Supreme Court of Indiana, April 27, 1882.

The indorsement of a promissory note as collateral security for a pre-existing debt, is in due coarse of business, and the indorsee is regarded as an innocent holder for value.

Appeal from the Allen Superior Court.

WOODS, J., delivered the opinion of the court:

Complaint by the appellee against the appellant upon a promissory note, alleged to have been made in Ohio and indorsed by the payee to the appellee before maturity and for value. The law of Ohio is also pleaded, under which the note was negotiable as an inland bill by the law merchant. The appellant answered by pleas of partial and entire want of consideration, and alleging that the note was assigned to the appellee as collateral security for a pre-existing debt of the payee to the appellee. Upon demurrer for want of facts these answers were held insufficient. The important question in the case is, whether the indorsement of negotiable paper as collateral security for antecedent debt, clothes the indorser with the rights of a good faith purchaser.

Insisting upon the negative, the counsel for the appellant cites Roxborough v. Messick, 6 Ohio St. 448, and cases from Maine, New Hampshire, New York, Pennsylvania, North Carolina, Tennessee and Mississippi, and suggests that the doctrine of these cases has been fully indorsed by this court in Busenbroke v. Ramsey, 53 Ind. 499.

The question in the last named case was, whether a mistaken description of mortgaged land could be corrected as against a second mortgagee who received his security in ignorance of the first mortgage; and, it appearing that the second mortgage was executed upon no new consideration, and only to secure an antecedent debt, it was held that the correction could be made. Whatever force there may be in the analogy, it is plain that a decision upon the rights of successive grantees or mortgagees of real estate can not be regarded as controlling upon the rights of an assignee of commercial paper, which was designed to circulate, and to a large extent is treated in the commercial world as a species of money.

The cases referred to in Busenbroke v. Ramsey, are not those cited by counsel, and upon the question now presented are no more in point than is that case.

The leading case in support of the view that the indorsee of such paper, who receives it only as a security for an existing debt, is not a good faith purchaser, is Coddington v. Bay, 5 Johns. Ch. 448, the doctrine of which still prevails in New York and some of the other States; but in the English courts, and by the Supreme Court of the United States, followed by the courts of last resort of many of the States, the contrary doctrine is distinctly declared and maintained; and it seems that Chancellor Kent, who delivered the opinion in Coddington v. Bay, afterwards expressed a preference for the rule declared by Justice Story in Swift v. Tyson, 16 Pet. 1.

In that opinion, and in the opinions of Justices Harlan and Clifford in the case of Railroad Company v. National Bank, 102 U. S. 14, and of Justice Redfield in Atkinson v. Brooks, 26 Vt. 574, may be found full and satisfactory discussions; and in accord with the English decisions, it is held that the assignment of commercial paper as security for an existing obligation is in the due course of business, and that the holder has the right therein of a purchaser for value. To the same effect are the following cases: Fisher v. Fisher, 90 Mass. 303; Roberts v. Hall, 37 Conn. 205; Bridgeport City Bank v. Welch, 29 Id. 475; Bank of Republic v. Carrington, 5 R. I. 515; Mix v. Bank, 91 Ills. 20; Robinson v. Smith, 14 Cal. 94; Boatman's Saving Inst. v. Holland, 38 Mo. 49; Amous v. McMichael, 36 N. J. L. 92; Maitland v. Citizens Nat. Bank, 40 Md. 540; Bank v. Chambers, 11 Rich. (Can.) 637; Gibson v. Conner, 3 Ga. 47; Grovanovich v. Citizens' Bank, 26 La. Ann. 15; Greneaux v. Wheeler, 6 Lix. 515. See, also, Bigelow on Bills & Notes, 502 *et seq.*; 1 Daniel Neg. Inst., secs. 820-833; Redfield v. Bigelow, Lead. Cases, pp. 186-217; 1 Ames' Cases on Bills & Notes, 650 n.

The case of Valette v. Mason, 1 Ind. 288, seems

also to be in point. It does not appear distinctly in the opinion in that case that the paper was transferred to secure a pre-existing debt; but in Works v. Broyton, 5 Ind. 397, is found a statement concerning the case which may be accepted as an authoritative interpretation, and which shows that the debt was in fact a pre-existing one. It is there said: "The question whether a mortgagee in a mortgage given for the security of a pre-existing debt, is to be regarded as a purchaser for a valuable consideration, has been decided differently by different courts; and there has been a like diversity of opinion upon the analogous question, whether the holder of commercial paper assigned as collateral security for a pre-existing debt is to be treated as a holder for a valuable consideration. The latter of these questions this court decided in the affirmative in Valette v. Mason, 1 Ind. 288." See, also, Rowe v. Hains, 15 Ind. 445; Babcock v. Jordan, 24 Id. 14; McKnight v. Kinsely, 25 Id. 336.

But if this court were not, as it seems to be, already committed to the doctrine held by the Supreme Court of the United States, we should be much inclined, if not constrained to follow it. On a subject of such general importance, and concerning which there can not properly be a local rule, and in which the commercial world has a common interest, uniformity and certainty of decision are greatly to be desired; and since the highest tribunals in this country and in England are ruling in harmony upon the point, a State court can hardly be justified in adopting, if, indeed, adhering to a different rule. It is assigned as error that the complaint does not state a cause of action, but the objections made to the pleading are unimportant and unsound. The exhibit referred to is sufficiently identified (Casper v. Kitt, 71 Ind. 24; Whitworth v. Malcombe, No. 8,102); and in this respect it is immaterial whether the statute of Ohio is well pleaded, as without that, a good cause of action is stated upon the note as a non-negotiable instrument.

Judgment affirmed with costs.

NEGOTIABLE PAPER — INDORSEMENT — UNDERTAKING THAT PRECEDING INDORSEMENTS ARE GENUINE.

COCHRAN v. ATCHISON.

Supreme Court of Kansas, May, 1882.

1. Where a stranger to a bill writes his name on the back thereof regularly following that of the payee, he thereby makes himself an indorser, and assumes all the obligations and liabilities usually assumed by indorsers of negotiable paper.

2. An indorser warrants the genuineness of the indorsement on a bill of exchange, and that he has a valid title to the bill.

3. If it be ascertained after the payment of the bill that the indorsement of the payee is forged, or that such indorsement is the signature of a false and spurious payee, the indorser immediately following such forged or spurious signature is liable to his immediate indorsee for the money obtained upon such indorsement, without proof of demand made and notice.

4. Where a bill is payable to the order of W. W. Owens, and it comes by mistake into the possession of one W. W. Owen, who wrongfully takes it from the post office, and thereafter the bill is paid by A, the cashier of a bank, upon the false and spurious indorsement of W. W. Owen, and the written indorsement of C regularly following that of the false and spurious payee, and A, having indorsed the draft, presents it to the drawee and collects the amount thereof, and thereafter the owner and real payee learns of the disposition of his draft and demands of A the proceeds so collected by him of the drawee, and A pays over to the real payee and owner such proceeds: *Held*, that C, by his contract of indorsement, is liable to A for the amount of the bill without demand made and notice, although he was ignorant at the time of his indorsement that Owen was not the actual payee and owner of the bill.

5. If a bill is payable to the order of a person, and another person of the same name of the payee gets hold of it and wrongfully indorses it to a party who wrongfully takes it in good faith and for value, such party acquires no title to the bill.

6. Where a bill is payable to W. W. Owens and one W. W. Owen gets hold of it and wrongfully indorses it, a subsequent indorser can not relieve himself from his liability as indorser to his immediate indorsee, on the ground that the latter is guilty of negligence in taking the paper without the name of the actual payee indorsed thereon. In the first place, the indorser guaranties the genuineness of the signature of the payee, and second, the difference in pronunciation between Owen and Owens is so slight as not to amount to a variance. The two names may be taken promiscously to be the same in common use.

Error from Johnson County.

E. B. Gill, for plaintiff in error; *I. O. Pickering*, for defendant in error.

Action by Atchison against Cochran to recover $151.30 paid to a false and spurious payee of a draft. The essential facts are:

On the 17th day of November, 1880, the assistant cashier of the First National Bank of Pueblo, Colorado, mailed a draft, of which the following is a copy:

"Colorado, No. 49009, duplicate, unpaid.

First National Bank, Pueblo, Nov. 17, 1880.

Pay to the order of W. W. Owens, Esq., $151.30, in current funds. Robert F. Lytle,
A Cashier.

To Bank of Kansas City, Kansas City, Mo.
$151.30. [U. S. Int. Rev. 2 cents.]"

To W. W. Owens, at Olathe, Kansas.

The letter containing the draft was received at Olathe, and placed by mistake in the post-office box of one W. W. Owen on the 19th day of November, 1880. On the same day, said Owen wrongfully took the draft from the post-office and went to the Johnson County Bank at Olathe, presented the draft to Robert M. Atchison, the cashier, and asked to have it cashed. The cashier

said to him that he must have some responsible person with whom he was acquainted to identify him. He went out, and in a short time returned with Cochran. Mr. Cochran said: "I know this man; his name is Will Owen." The cashier then asked Cochran how long he had known the young man, and he replied about two years; that he had worked for his son-in-law, John Burch, on the farm, and for Mr. Collins, and other neighbors, and during that time he had known him as William, or Bill Owen. The cashier told Owen to indorse the draft and then pushed the draft to Cochran, and he wrote his name just below that of Owen. The cashier then paid the money on the draft, $151, to Owen, and retained thirty cents for exchange. Owen immediately went out of the bank. The cashier then indorsed the draft, and sent it to the Bank of Kansas City for collection and credit. The draft was promptly paid by that bank upon presentment, and the cashier given credit for the full amount.

In ten days to two weeks thereafter, W. W. Owens, the owner and the real payee of the draft, was in the Johnson County Bank, at Olathe, and informed the cashier that he was expecting some money from Pueblo. In a short time the cashier was satisfied that he had paid the money on the draft to the wrong party, and afterwards paid the full amount of the draft to the real payee, W. W. Owens. After he had paid the money to Owens, he made a demand upon Cochran for the money paid over to the false and spurious payee, and he refused to pay it or any part thereof. At the time that the cashier sent the draft to the Bank of Kansas City, the following indorsements were on the back: "W. W. Owen, Peter Cochran, and credit; R. M. Atchison, cash." Afterward, W. W. Owen was arrested for obtaining money from Atchison under false pretenses, and at the March term, 1881, of the District Court of Johnson County, was convicted thereof and sentenced for a term of three years in the penitentiary. On February 11, 1881, Atchison brought his action before a justice of the peace of Johnson County against Cochran to recover the amount of the draft paid to Owen. After judgment had been rendered before the justice, the defendant appealed to the district court. The case was there tried to the court without a jury, and judgment rendered in favor of Atchison for 151.30, with interest from the 30th day of November, 1880, together with all costs. Cochran excepted and brings the case here.

HORTON, C. J., delivered the opinion of the court:

Plaintiff in error alleges that the action brought by defendant in error against him can not be sustained because, as he contends, he is not liable upon the bill of exchange as indorser, guarantor or otherwise. He also alleges that if he was the indorser of the bill he is not liable, as the bill was paid upon presentment, and, if it had not been, no recovery could be had against him, as no steps were taken to charge him as indorser. He further submits that he is not liable for the money paid to the false and spurious payee, as he received no benefit from it. He claims that he went to the bank merely to identify W. W. Owen, and that at the request of the cashier he wrote his name on the back of the bill for the purpose of identifying Owen; that he had no interest in the bill, did not negotiate it, and was not informed and did not understand that he was signing as an indorser. The position taken by plaintiff in error is untenable. His contract was a written one, and he became liable to all its terms. An indorsement of a bill by a third person regularly following that of a payee, constitutes such third person an indorser of the bill, and thereby he assumes all the obligations and liabilities of an indorser of negotiable paper. It is true, in this case, that W. W. Owen was not the real payee, and was in fact a false and spurious payee only, and therefore his indorsement of the bill did not transfer title to Cochran or Atchison; but at the time of the indorsement by Cochran, the latter, by writing his name on the back of the bill, immediately following that of Owen, warranted the genuineness of the prior indorsement, and that he had valid title thereto. By such warranty of the genuineness of the prior signature, he placed himself in the position of an indorser of the bill. He was accepted by Atchison as an indorser. The money was paid on the bill because of his indorsement and reliance upon the well defined contract which the law implies by such indorsement. He can not now be heard to say he did not understand he was signing as an indorser; nor can he, after having assumed the obligations and liabilities of an indorser, relieve himself of the consequences to the injury of his indorsee upon the ground that the loss to such indorser was occasioned by the latter's own negligence. Cochran, by his indorsement, engaged that the bill would be paid according to its purport, and this engagement was conditional upon due presentment or demand and notice. He also engaged that the bill was in every respect genuine; that it was the valid instrument it purported to be; that the parties thereto were competent; that he had a lawful title to the bill and the right to indorse it. Daniel on Negotiable Instruments, secs. 669, 672, 673; Chalmer's Digest, pp. 215-217, arts. 217-220. It is well settled by the authorities, if it turns out that any of these latter engagements are not fulfilled, the indorser may be sued for the recovery of the original consideration which has failed, or be held liable as a party without proof of demand made and notice. Daniel on Negotiable Instruments, p. 531, sec. 669. Even after the payment of a bill, if it be ascertained that any of the indorsements are forged, the drawee can recover backm from the person to whom he paid it, and so each preceding indorser may recover from the person who indorsed it to him. In this case, it turned out that the engagement of Cochran as indorser was not fulfilled. W. W. Owen was not the real payee; he was not in fact a false and spurious

payee; he was not the lawful holder of the bill and had no right of property or possession therein. The indorsement of Owen was false and spurious, and neither he nor Cochran had the right to indorse it or appropriate its proceeds. Although Atchison took the draft upon the indorsement of Cochran in good faith and for value, he had no right or title to it, and his payment of the draft to Owen did not divest or impair the title of the true owner who had not indorsed it. If a bill is payable to the order of a person, and another person of the name of the payee gets hold of it and indorses it to a party who takes it in good faith and for value, such party acquires no title to the bill. Chalmer's Digest, art. 81, p. 89. It is immaterial whether Cochran acted in good faith or not. He is held by his written contract, and, as Atchison took the paper thereon and parted with his money, he was entitled to have it refunded, as he acquired no title or interest in the bill, and was wrongfully deprived of his money without any consideration therefor. Cochran was liable upon his written contract or indorsement without written proof of demand made and notice.

Counsel for defendant suggest that as "Owen," not "Owens," indorsed his name on the back, that Atchison was guilty of negligence in taking the bill without the indorsemert thereon of the name of the payee. Atchison and Cochran seem to have regarded the bill payable to W. W. Owen, and in this neither were guilty of negligence, because the difference in pronunciation between "Owen" and "Owens" is so slight as not to amount to a variance. The two names might be taken promiscuously to be the same in common use.

The judgment of the district court will be affirmed. All the justices concurring.

WEEKLY DIGEST OF RECENT CASES.

APPEALS—WRITS OF ERROR.

Construing sections 1003 and 1008 of the Revised Statutes of the United States as *in pari materia*, the limitation of two years prescribed by the latter section applies as well to writs of error from this court to State courts as to writs of error to the Federal circuit and district courts. *Cumming v. Jones*, U. S. S. C., October Term, 1881.

CHATTEL MORTGAGE — ASSIGNMENT — INDORSEMENT.

The indorsee of a negotiable promissory note secured by a chattel mortgage which was transferred at the same time the note was indorsed but not assigned in writing, can not maintain replevin in his own name for the mortgaged property against the mortgagor. *Ramsdell v. Tewksbury*, S. C. Me., February 20, 1882.

CHATTEL MORTGAGE—BREACH OF CONDITION NOT TO SELL.

Where, in a mortgage on goods in a store, it was stipulated that if the mortgagor should "sell, assign or dispose of, or attempt to sell, assign or dispose of, the whole or any part of the said goods or chattels, or remove the whole or any part thereof from the said city, without the written assent of the party of the second part," the mortgagee might take possession and dispose of the property. A use of any amount of the goods by the mortgagor to pay an existing debt due by him is illegal. *Laing v. Perrott*, S. C. Mich., April 25, 1882.

CONTRACT — ACCORD AND SATISFACTION—ACCEPTANCE OF NOTE.

The acceptance of a negotiable promissory note in discharge of an undisputed debt after it is due, which note is for a less sum than the amount of the debt, operates as a good accord and satisfaction. *Semble*, that payment of part of an undisputed debt after it is due, though accepted in full, is not a good accord and satisfaction. *Mechanics' Bank v. Huston*, S. C. Pa., February 13, 1882.

CONTRACT — EXECUTORY ARRANGEMENTS — CONSTRUCTION.

Where parties enter into executory arrangements for the sale of chattels to be obtained subsequently by the seller, and leave the exact quantity unfixed and remit its ascertainment to the future act of the seller, under a stipulation that it is to be so much, "more or less," the contract should be practically construed. *Bea v. Holland*, S. C. Mich., April 25, 1882.

CONTRACT—VERBAL GIFT OF INTEREST ACCRUED ON MORTGAGE—SATISFACTION OF MORTGAGE.

A married woman having a mortgage upon which there was due principal and interest, gave to her husband the interest which was due, and put the mortgage into his hands. The mortgagor exchanged the mortgaged lands for others under an agreement whereby he was to pay off the inferest. He deeded the lands, and at the same time paid the grantees the interest on their promise to hand it over to the husband. The grantees having failed to pay it: *Held*, that the husband might maintain an action against them for money received to his use. The wife subsequently purchased the lands subject to the mortgage except as to this interest, and then discharged the mortgage of record. *Held*, that this did not affect the husband's right of action. *Fay v. Sanderson*, S. C. Mich., April 25, 1882.

CORPORATION—STOCKHOLDER'S RIGHT TO ASSERT CORPORATE CLAIM.

Hawes v. Water-works Company, *ante*, p. 288, followed, and a bill by a stockholder of a corporation to assert a claim proper to be asserted by the corporation itself, which fails to show that proper effort had been made to induce the corporation to assert the claim, and which fails to rebut the reasonable presumption that it is a collusive attempt to give the Federal courts jurisdiction, dismissed. *Huntington v. Palmer*, U. S. S. C., October Term, 1881.

CRIMINAL LAW — DISTURBANCE OF RELIGIOUS WORSHIP.

The disturbance of a religious congregation by singing, when the singer does not intend so to disturb it, but is conscientiously taking part in the religious services, may be a proper subject for the discipline of his church, but is not indictable. *State v. Linkhaw*, S. C. N. C.

FEDERAL PRACTICE — APPEAL — AFFIRMED FOR WANT OF ASSIGNMENT OF ERRORS.

A motion to affirm granted in a case where it appeared to the court that the writ of error had

been taken for delay only, and contained no assignment of errors, as required by section 997 of the Revised Statutes of the United States. *Micas v. Williams*, U. S. S. C., October Term, 1881.

FIXTURES—GAS FIXTURES ARE CHATTELS.

Gas fixtures are mere personal chattels and not fixtures, in the proper sense of the term. Hence they do not pass by a sheriff's sale to the vendee of the realty. *Penn Mut. Life Ins. Co. v. Thackara*, S. C. Pa., March 21, 1881.

FRAUDULENT CONVEYANCE—DEED TO WIFE—PROCEEDS OF HER FUNDS.

Where a wife loaned her husband money with which he purchased real estate, taking the title in his own name, and afterwards sold the real estate and with the purchase money he started a grocery and carried it on in his own name, and subsequently sold the grocery, receiving as a part of the consideration therefor the lands in controversy deeded to his wife, *held*, not a fraudulent preference. *Lappig v Bretzel*, S. C. Mich., April 25, 1882.

FRAUDULENT CONVEYANCE— SOLVENT GRANTOR—SUBSEQUENT CREDITORS—BURDEN OF PROOF.

A voluntary conveyance made by a party solvent at the time, may be impeached and set aside by subsequent creditors, provided it be executed with the intention and design to defraud those who should thereafter become his creditors. Where such fraud is charged, the fraudulent purpose will not be presumed, but must be proved. The *onus* rests on the parties assailing the deed to establish the fraudulent intent by satisfactory proof. *Matthai v. Heather*. S. C. Md., January 19, 1882.

GUARANTY—DISTINCTION BETWEEN CONTRACTS OF GUARANTY AND SURETYSHIP.

A executed under seal an indorsement upon a bond bearing date some time previous as follows; "I hereby guarantee the payment of the within in full to the obligee." At maturity the bond was not paid, but by agreement of the obligor and obligee was extended for a period of nearly seven years, the obligor paying interest on it at a higher rate than six per cent. During all this time said obligor was solvent, and possessed of property of much greater value than the amount of the debt. The obligor having failed, and A having died, the obligee claimed the amount of the debt out of A's estate, *Held*, that A's liability was that of a guarantor only, and not that of a surety, and that since the obligee had failed to use due diligence in obtaining the amount of the debt from the obligor, his claim on A's estate was properly disallowed. *Seipple's Appeal*, S. C. Pa., March 6, 1882.

HOMESTEAD—"HEAD OF FAMILY"—MARRIED WOMAN—ABANDONMENT.

A married woman who supports her family, or contributes to its support, by the employment of a team, may claim the benefit of the laws exempting a team from execution. A resident of Michigan who removes to a foreign State, thereby loses the benefit of the Michigan exemption laws as to any property which may be afterwards found within the State. *Curtis v. McHugh*, S. C. Mich., April 25, 1882.

HOMESTEAD—WIFE'S ABANDONMENT OF HUSBAND.

When a man has a homestead, if his wife leaves him without his consent to reside elsewhere, but he refuses to go with her and continues in the homestead, he is not by her leaving deprived of his exemption privilege. That he rents a part of the homestead, and is sometimes away from it, are circumstances that do not affect his right so long as he retains a possession and claims the homestead privilege. *Pardo v. Bittorf*, S. C. Mich., April 25, 1882.

HUSBAND AND WIFE — WIFE'S INTEREST IN HUSBAND'S LAND.

The question presented is, what interest does a purchaser at sheriff's sale take in the land of a married man as against his second and childless wife, there being children by a former wife, and as against such children: *Held*, in such case the wife takes a fee in one-third of the land as against such purchaser, under sec. 17 of the statute of descents, but as to the children she takes only a life estate. *Caywood v. Medsker*, S. C. Ind., May 18, 1882.

INSURANCE, FIRE—OPEN POLICY.

A policy of insurance for $800 on a certain dwelling house, which sum does not exceed two-thirds of the value of the house, as appears from the application that was made part of the policy, which also contains a stipulation that the company will pay the assured "all loss or damage," not exceeding the sum assured, within ninety days after due notice and "proofs" of such loss or damage, is an open and not a valued policy. *Farmers' Ins. Co. v. Butler*, S. C. Ohio, May 9, 1882.

JUDGMENT — FORMER RECOVERY — IDENTITY OF CAUSE OF ACTION AND PARTIES.

If the cause of action in which the judgment was rendered was the same as the cause of action in which the judgment is plead, and both actions have been brought to obtain relief at law or in equity upon the same cause of action, the last action is subject to the estoppel of the judgment in the former action. And the judgment as rendered in that action is conclusive upon all questions involved in the action and upon which it depends, or upon matters which, under the issues, might have been litigated and decided in the case; and the presumption of law is that all such issues were actually heard and decided. *Parnell v. Hahn*, S. C. Cal., April 10, 1882.

LIBEL—FOREIGN LANGUAGE—DAMAGES TO CARRY COSTS.

An article in print, which not only depreciates a tradesman's wares, but charges him with counterfeiting genuine articles and their labels, is libellous. Where a libellous article was circulated in a foreign language, it is not necessary to show that it was understood, nor that those conversant with such language were citizens. In an action for libel it is not improper for the court to inform the jury of the amount of damages which would carry costs. *Kimm v. Steketee*, S. C. Mich., April 25, 1882.

NEGOTIABLE PAPER—DELAYING PRESENTATION—RELIEF OF INDORSER.

The Supreme Court, in considering the report of a referee and the exceptions to it on a writ of error to the circuit court, can not look behind the report, and must assume it to be correct. Where a ticket agent of a railroad received money and a draft on deposit from various persons, on condition that on a future day the money and draft should be returned to such persons if they did not elect to take an excursion ticket to be issued at that time, his holding of the draft till the day of the excursion is not such an unreasonable delay in presentment as will relieve the indorser from liability. *Nutting v. Burked*, S. C. Mich., April 25, 1882.

PRACTICE—ACTION UPON INSTRUMENT PURPORTING TO HAVE BEEN SIGNED BY DEFENDANT—UNVERIFIED PETITION—LOST NOTE.

Suit upon a note alleged to have been lost. The general denial by the defendant, being unverified, admitted the execution of the note and required the plaintiffs to prove, in order to excuse the non-production of the note, its existence, terms and loss. It was therefore error to charge, as the court did, that the plaintiffs must prove the execution of the note. 70 Ind. 310. Upon proof of the existence and loss of the note and its terms, the plaintiffs were not entitled to recover unless payment was proved by defendant. The burden of the issue as to payment was upon the defendant and not upon the plaintiffs. Judgment reversed. *Pattison v. Shaw*, S. C. Ind., May 17, 1882.

STATUTE OF FRAUDS—REQUISITES OF MEMORANDUM.

When a memorandum containing the names of the vendor and vendee is made, signed and delivered by the vendor to the vendee, and accepted as and for a completed memorandum of the essential terms of a contract, and it is capable of a clear and intelligible exposition, it is conclusive between the parties, and parol evidence is not competent to vary its terms or construction; and if in fact some of the conditions actually made be omitted from it, the party defendant can not avail himself of them. *Williams v. Robinson*, S. C. Me., February 20, 1882.

STATUTE OF FRAUDS—TRUSTS—VESTING IN PAROL.

Where a person at the time of his death deposits money and personal property in the hands of a third party, to be delivered to his daughter after his death, such third party is a trustee put in charge of definite duties which are not within the statute of frauds and may vest in parol. *Bostwick v. Mahaffy*, S. C. Mich., April 25, 1882.

WILL—POWER OF APPOINTMENT—DEFECTIVE EXERCISE.

A power of appointment given by the last will of A to B, having been ineffectually exercised by the death in B's lifetime of the person in whose favor B, by his last will, exercised the power, so that its purpose can never be accomplished, it is to be treated as never having been exercised at all. In other words, a default of appointment having occurred, the fund must be distributed in accordance with the will of the donor, A, which instrument provided that in default of appointment by B, the fund shall be paid to his heirs under the intestate laws. *Schiveley's Appeal*, S. C. Pa., January 31, 1882.

QUERIES AND ANSWERS.

*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

55. What is meant by the expression "able-bodied," as used in the statutes of Missouri defining vagrancy, and designating who shall work on public roads and highways? Has the expression received judicial construction? J.

Boonville, Mo.

56. 1. Could Guiteau have applied to the Supreme Court of the United States for a writ of *habeas corpus* before final trial and conviction, and so had the question of jurisdiction determined there? 2. Are the courts of the District of Columbia United States courts, and their judges United States judges, within the meaning of sec. 753 U. S. Revised Statutes of 1878?

Wilber, Neb. E. E. MCGINTIE.

QUERIES ANSWERED.

Query 29. [14 Cent. L. J. 275.] Are war claims negotiable? The right to land or the right to pension which a soldier is given by the U. S. Laws? The best work on war claims? W. W. R.

Jackson, Mich.

Answer. 1. War claims are not negotiable, nor even assignable. The act of Feb. 26, 1853 (U. S. Rev. Stats., sec. 3477), declares that "all transfers and assignments of any claim upon the United States * * * shall be absolutely null and void," unless made "after the issuing of a warrant for the payment thereof." In Spofford v. Kirk, (U. S. Sup. Court 1878), 97 U. S. (7 Otto) 484, such assignments were held invalid and of no effect, even between the parties thereto. See, also, United States v. Gillis, 95 U. S. (5 Otto) 407, where it is also held that the act of Feb. 24, 1855, establishing the court of claims does not make claims assignable, which before its enactment were incapable of assignment. 2. The U. S. Rev. Statutes, sec. 4745, provide that "any pledge, mortgage, sale, assignment or transfer of any right, claim or interest in any pension * * * * shall be void."

New York. HENRY H. BROWNE.

Query 48. [14 Cent. L. J. 377.] An officer attached personal property as the property of A. The property was receipted, B and C signing the receipt, and the property given into their hands. Judgment was obtained against A, and execution issued. The attaching officer having the execution demanded the property of the receiptmen B and C, who delivered it, and the officer sold it in part satisfaction of the execution. B, one of the receiptmen, then brought replevin against the purchaser at execution sale, claiming that he had purchased the property of A before the attachment, and made A his agent to hold and use it till he called for it. Was a demand necessary before replevin brought? H.

Boston, Mass.

Answer. Was a demand necessary before action? I say yes, from a New York view. When defendant has put it out of his power to deliver, a demand is not necessary. S. C. 1823, Delamater v. Miller, 1 Cow. 75; 1 Johns. Cas., 406; Everett v. Coffin, 6 Wend. 603. But the contrary was held by the New York Supreme Court, Special Term, and that a demand was in all cases absolutely necessary; opinion by Donohue, J., In eplevin a a demand is necessary. "The law abhors litigation," and an innocent holder of property must not be subjected to the vexations of a replevin suit, until after a demand and production of title. He has a chance to elect whether he will retain possession of chattel claimed, or defend his possession in court. But B, I hold, was barred from prosecuting any action against purchaser on judgment sale; his remedy was against attaching officer if, after due notice had been given to such officer, and evidence of B's title, such officer had persisted in taking it, or on the un-

dertaking. If B allowed officer to attach property belonging to him, as pertaining to A, he is barred by his own laches; evidence of such laches has been held to be a complete defense, and most assuredly if action would not stand against sheriff, etc., it could not be maintained against sheriff's purchaser. But, on a different ground, when the coming into possession was tortious, no demand was, or is necessary; here there is no tort, and a demand is imperative to maintain an action. Were I called upon to decide an action then, I should say: To bring defendant before the court properly a demand and refusal was necessary to constitute a cause of action, and when the defendant came before the court he should have judgment, as the plaintiff had barred himself.

New York. HARRY A. ALLEN.

Query 51. [14 Cent. L. J. 377.] A, the owner of certain real estate, leaves his home and is unheard of for more than seven years. B applies for and obtains letters of administration which were granted by the court, upon the presumption of A's death. B, the administrator, under the direction of the court, sells the real estate of which A was seized to C, and executes to him a deed, and distributes the proceeds of the sale among the distributees of A, and is discharged by order of the court. Subsequent to the proceeding A returns to his home. Can A maintain an action in ejectment against C and recover his land? If A can recover, what remedy has C? C. D. P.

Washington, D. C.

Answer No. 1. A probate court has no jurisdiction to grant letters of administration upon the estate of a living person; and, if it does so supposing the person to be dead, when such is not the case, its proceedings are void *ab initio*, as are all things done in pursuance thereof. Moore v. Smith, 11 Rich. 569; D'Arusmont v. Jones, 11 Cent. L. J. 253. In the case put A, therefore, can maintain ejectment against C. The remedy of C is against B if his deed contain a clause of warranty, otherwise not. He has also a remedy against the distributees of A, who received the purchase money at the hands of B. The money was paid by C under a mistake of fact, to persons having no ground in conscience to receive it, and in such case it is recoverable. Glenn v. Shannon, 12 S. C. 572.

Chester, S. C. G. W. G.

Answer No. 2. Administration on the estate of a person who turns out to be alive is void *in toto*, and consequently A can maintain ejectment against C and recover his land. Melia v. Simmons, 45 Wis. 334; Griffith v. Frazier, 8 Cranch. 9; Allen v. Dundas. 3 Term. Rep. 125. The whole question is fully discussed and decided in D'Arusmart v. Jones, 11 Cent. L. J. 253, decided in the Supreme Court of Tennessee, April, 1880. C's remedy, if any, is against B for money had and received, and B has a remedy over probably against the parties to whom he made distribution. *Vide* D'Arusmart v. Jones, *supra*.

Vicksburg, Miss. J. D. GILLAND.

Query 50. [14 Cent. L. J. 377.] A executed and delivered to C a mortgage on real estate situated in Massachusetts. Subsequently A's right, title and interest or right of redeeming said mortgaged real estate was attached by a creditor of A and sold on execution, the creditor purchasing the same, who notified the tenant that he had purchased A's right, title and interest or right of redeeming said mortgaged real estate, and all rents accruing after that time must be paid to him. Subsequently C, the mortgagee, entered upon the premises for the purpose of collecting the rents and profits, and notified the tenant that he held said mortgage, that the condition thereof had been broken, and all rents which might have accrued thereafter must be paid to him; to which the tenant made no answer, but continued to occupy said premises for a long time, and refused to pay C, the mortgagee, for the use and occupation of the same, claiming to be a tenant of the creditor, to whom he paid the rent. Can C, the mortgagee, maintain an action against the tenant for the use and occupation after said notice? M.

Worcester, Mass.

Answer. In determining the liability of the tenant to the mortgagee for the rents and profits and their relation to each other, much depends on the fact as to whether the lease was made before or after the execution of the mortgage. If made antecedent to the execution of the mortgage, the mortgagee is entitled to receive the rents upon notice to the tenant whenever he is entitled to possession, and the action, of course, is brought against the tenant. If the mortgagor or the purchaser of the equity of redemption being in possession of the estate, and made the lease subsequent to the execution of the mortgage, the mortgagee can maintain no action against the tenant to recover the rent until an actual entry or taking possession by the mortgagee, unless the tenant promises to pay the rent to him. He can not, by mere notice, compel the tenant to pay the rent to him, and his title to the rent does not accrue until he has taken possession of the mortgaged estate. W. C. FROST.

Fayette, Tenn.

RECENT LEGAL LITERATURE.

AMERICAN REPORTS — INDEX-DIGEST. Index-Digest of the American Reports. Volumes 25 to 36 inclusive. By Irving Browne. Presented by the Publisher to the Subscribers for the American Reports. Albany, 1882: John D. Parsons, Jr.

This little volume of 190 pages is a gift to the subscribers for the American Reports—from the publisher, according to the title page—from the editor of the series, as indicated by the language of the prefatory note. The source of the gift, however, is a matter of no importance, and it will probably be deservedly appreciated without reference thereto. It is a key to volumes 25-36 inclusive, and consequently begins where the former digest left off, and comes down to date. It is issued in this form (as stated in the prefatory note above mentioned) instead of the form of that of the first twelve volumes of the series (*i. e.*, "reproducing the headnotes and necessarily forming an expensive volume of at least 600 pages,") because soon another digest will be necessary when it will be issued, including twenty-four volumes. We regard the plan pursued in this instance as much the most desirable form for a digest in any event. We have wished that the makeshift device of reproducing the head-notes of reports so usual in the preparation of digests, had never been invented. It seems to us that such a method serves no purpose save to lighten the digester's labors, and unnecessarily increase the size and consequently the price of the volume. The offices of

the *syllabus* of a report, and of the reference in a digest are, and must be, in the nature of things, totally distinct. The digest is intended to serve as a guide-post, and to direct the investigator to where the object of his search may be found, and not to present him with a *resume* of each case referred to. A *syllabus*, on the other hand, is intended to present a succinct statement of principles of which the reported decision, which it precedes, forms an illustration, and thus to prepare the reader's mind for a perfect comprehension of the elaborate statement of facts and principles which follows. From the nature of its office it must precisely and fully, and yet briefly state the exact principles upon which the decision turns. This, in most instances, is a far more laborate and verbose statement of the doctrine than is necessary or desirable in a digest. The reason for the adoption of the method in vogue is contained in the editor's *naive* statement in the prefatory note that the labor of making an index-digest is "enormously greater than the other system." We hope to live to see the day when the old style digest shall have become a thing of the past, and index-digests, covering the entire field of adjudications, shall have become available. The specimen before us is excellent, and its precision and accuracy have enlarged our ideas as to the possibilities of the system, and encouraged the belief that the digest of the future will be constructed upon this method. We have but two adverse criticisms to offer, and those are both with reference to minor details. We think that in references, the titles of cases should have been given as well as the number of the volume and page, although we admit that such is not the custom of works of that class. Our other objection is a matter of typographical rather than editorial jurisdiction. The cross-references at the close of a heading should be printed in different type or so spaced as to indicate that they are cross-references from the whole heading, and not from some subheading which they may happen to follow.

MISSOURI BAR ASSOCIATION. Report of the First Annual Meeting of the Missouri Bar Association, held at St. Louis, Missouri, December 27 and 28, 1881.

This document is of the most satisfactory nature, and the profession, and the friends of legal progress generally, have cause for congratulation at the progress which has been made by this organization in the first year of its existence. Among the features of the meeting worthy of notice were the remarks of Mr. Hitchcock upon the occasion of offering the resolutions (which we have hitherto produced, 14 Cent. L. J. 21) expressive of the sense of the meeting on the various measures pending before Congress for the relief of the Federal Supreme Court. Mr. Hitchcock being one of the committee of the American Bar Association upon that subject, composed of some of the most eminent practitioners of the whole country, had given the subject special thought, and his precise analysis of the arguments offered for and against the three chief plans of relief offered, are a valuable contribution to the mass of literature on that subject, which has now grown to be quite voluminous. The annual address of Hon. Wm. G. Hammond, LL.D., Dean of the St. Louis Law School, on the "Nature and Value of the Common Law," is a masterly discussion of a topic which, though an old one, is by no means well understood. The paper of Mr. Jay L. Torrey on the "Judicial System of Missouri," we have commented upon elsewhere. 14 Cent. L. J. 1. It contains some original views upon the judicial system of the State that are well worthy careful reflection. Another matter which seems to us pregnant with meaning, is the fact that a resolution to the effect that the association recommend to the voters of the State the adoption of the proposed amendment to the Constitution with reference to the relief of the Supreme Court, was tabled by a vote of 26 to 15. It is to be hoped that when the election comes the amendment will share a similar fate.

The membership of the organization shows a most hopeful increase, and numbers nearly 300.

NOTES.

——Lord Newton was known as the wearer of "Covington's gown," in memory of the patriotism and humanity displayed by the latter in defending the Jacobite prisoners on their trial at Carlisle in 1747. He participated largely in the bacchanalian propensities so prevalent among the legal men of his time, and was frequently known to put "three lang craigs" (*i. e.*, long-necked bottles of claret) "under his belt" after dinner, and thereafter dictate to his clerk a paper of more than sixty pages. The MS. would then be sent to press, and the proofs be corrected next morning at the bar of the Inner House. He would often spend the whole night in convivial indulgence at the Crochallan Club, perhaps be driven home to York Place about seven in the morning, sleep for two hours, and be seated on the bench at the usual hour. The French traveler Simond relates his surprise "on stepping one morning into the Parliament House to find, in the dignified capacity and exhibiting all the dignified bearing of a judge, the very gentleman with whom he had just spent a night of debauch and parted from only one hour before, when both were excessively intoxicated."